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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVIDALIA LANDAVERDE et al.,

Plaintiffs and Appellants,

v.

CITY OF FONTANA et al.,

Defendants and Respondents.

D074892

(Super. Ct. No. CIVDS1208532)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Donald R. Alvarez, Judge. Affirmed.

Perez & Caballero, Frank J. Perez, Miguel G. Caballero; Esner, Chang & Boyer,
Stuart B. Esner and Steffi A. Jose for Plaintiffs and Appellants.

Horvitz & Levy, Steven S. Fleischman, Scott P. Dixler; Lynberg & Watkins,
S. Frank Harrell, Shannon L. Gustafson and Jesse K. Cox for Defendants and
Respondents.

I.

INTRODUCTION

Plaintiffs Davidalia Landaverde, Elmer Landaverde, Edgar Landaverde, Alex Landaverde, Pillar Aguillon, and Elsa Marina Castellanos Mayorga appeal from a judgment entered in favor of defendants the City of Fontana and Jason Coillot, a Fontana police officer. The plaintiffs sued the defendants for negligence after Jose Landaverde and Olga Castellanos were killed when the vehicle in which they were travelling was hit by Officer Coillot's patrol car while he was responding to a call for additional police units at a location in gang territory.¹

The case was tried before a jury. At the conclusion of the trial, the jury rendered a special verdict in which it made two findings: (1) that Officer Coillot was responding to an emergency at the time of the collision, and (2) that Coillot was not negligent with respect to the collision.

On appeal, the plaintiffs challenge an evidentiary ruling that the trial court made during the trial—i.e., a ruling allowing the defense to show the jury an 11-second video reenactment of the collision. According to the plaintiffs, the trial court should have applied a heightened standard for admissibility to the video because it was a "simulation" that involved the application of novel scientific principles, and not an "animation" that reflected what amounted to a visual summary of witness testimony. The plaintiffs argue in the alternative that even if the video constitutes an "animation" and not a "simulation,"

¹ The plaintiffs are relatives of Jose Landaverde and Olga Castellanos.

and is therefore not subject to heightened admissibility standards, the trial court nevertheless abused its discretion in allowing the jury to view the video because, according to the plaintiffs, it inaccurately depicted the conditions that existed at the time of the collision.

We conclude that the plaintiffs cannot challenge the admission of the video on the ground that it constituted a "simulation" rather than an "animation" because the plaintiffs did not raise this contention in the trial court. We further conclude that the plaintiffs have not demonstrated that the trial court abused its discretion in allowing the video to be admitted as an animation. Rather, the record demonstrates that the court acted within its discretion in concluding that the video depicted conditions substantially similar to those that existed at the time of the accident, as described by witnesses, and was thus admissible. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*²

On the evening of May 26, 2012, Fontana Police Officer Jason Coillot was driving his patrol car northbound on Juniper Avenue in the City of Fontana when he heard over the police radio in his patrol car that a fellow officer was responding to a complaint of a loud party in a part of Fontana that is prone to gang violence. Calls regarding parties can

² We present the facts in the light most favorable to the judgment. (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 252, fn. 1 ["Following the usual rules on appeal after a trial on the merits, we construe the facts, including all conflicting facts, in the light most favorable to the verdict"].)

be dangerous because they often involve large groups of people who are under the influence of alcohol. Officer Coillot adopted emergency procedures that included mapping out a route to get to the location by way of Juniper Avenue because Juniper had fewer controlled intersections with four-way stoplights than another nearby major road, activating his vehicle's emergency lights to the "third position," which "gives the maximum visibility" because it uses "the most lights," and accelerating to approximately 55 miles per hour.

Initially, two units had been dispatched to the party. Officer Coillot was not one of the first two units to respond to the call. After those units responded, a request was made for additional units to respond to the scene. Subsequently, a third call went out for additional units, including one with a canine, and for a helicopter. After Coillot heard this third call requesting additional units he concluded that there was an emergency situation and decided to respond to the scene.

As Officer Coillot traveled on Juniper Avenue, he activated his emergency lights, and he drove near the center of the road in order to maximize the potential for other drivers to see his patrol car.³ He traveled at a maximum speed of 57 miles per hour. That area of Juniper Avenue is residential, and Coillot's speed was in excess of the posted speed limit in the area. California law permits police officers to exceed the posted speed limit when responding to emergencies as long as they activate their emergency lights and,

³ Officer Coillot decided not to activate the siren on his patrol car in order to minimize the possibility of alerting potential suspects to his presence; Officer Coillot also knew that his car would have the right of way along the route that he was traveling on Juniper Avenue.

if reasonably necessary, use a siren. (See Veh. Code, § 21055.) Coillot's siren was not activated.

At the same time that Officer Coillot was driving northbound on Juniper Avenue, Jose Landaverde was driving westbound on Ceres Avenue. Ceres Avenue intersects with Juniper Avenue. Traffic traveling on Juniper has the right of way through the intersection at Ceres Avenue. Traffic traveling on Ceres Avenue is controlled by a stop sign at the intersection. In addition, the word "stop" is painted on the asphalt. A sign is posted on Ceres Avenue at the intersection with Juniper Avenue alerting drivers that traffic on Juniper Avenue does not stop.

As Officer Coillot was driving on Juniper Avenue, Landaverde accelerated away from the stop at approximately 6 miles per hour and moved into the middle of the intersection, at which point Coillot's vehicle struck Landaverde's vehicle while travelling approximately 54 to 57 miles per hour. Coillot testified that Landaverde's decision to enter the intersection in front of the patrol car was unexpected and sudden.

After the collision, Officer Coillot got out of his patrol car and noticed that the front windows of Landaverde's vehicle were darkly tinted. Subsequent lab testing confirmed that the front windows of Landaverde's car were tinted. California law prohibits the application of dark tinting to the front windows of an automobile,⁴ the tinted windows on Landaverde's car could have contributed to the accident by obstructing Landaverde's view of the approaching patrol car.

⁴ See Veh. Code, § 26708, subdivision (a)(2).

Jose Landaverde and Olga Mayorga de Castellanos died as a result of the injuries that they suffered in the collision. The occupant of the front passenger seat, Davidalia Landaverde, survived the collision, as did Officer Coillot.

Officer Coillot's patrol car was equipped with a computer, often referred to as a "black box," that records information about how the vehicle is running and its performance. The San Bernardino Sheriff's Department downloaded the data from Coillot's patrol car computer after the incident. The data showed that Coillot had been driving at a speed of approximately 20 miles per hour on a different street, and that when he began traveling northbound on Juniper Avenue, he accelerated to 57 miles per hour as he approached the intersection of Ceres Avenue and Juniper Avenue.

B. Procedural background

The plaintiffs filed a complaint against Officer Coillot and his employer, the City of Fontana.⁵ The plaintiffs alleged that Officer Coillot was negligent on the night of the collision, and that it was his negligence that caused the collision that resulted in the deaths of Jose Landaverde and Olga Mayorga de Castellanos, as well as the injuries suffered by Davidalia Landaverde.

The plaintiffs' claims proceeded to a jury trial. As part of their case, the defendants produced and sought to admit an 11-second animated video demonstrating the defense's version of what occurred in the moments leading up to the collision. The video shows the intersection of Juniper Avenue and Ceres Avenue at night, from an overhead

⁵ The plaintiffs originally filed suit against Officer Coillot as a Doe defendant.

perspective, with the camera facing southeast, across from where the two vehicles were traveling. The video shows Officer Coillot's patrol car heading toward the intersection with its emergency lights on, and shows Landaverde's vehicle waiting behind the limit line on Ceres. The video reflects Coillot's patrol car traveling northbound on Juniper Avenue from Merrill Avenue with its emergency lights activated, and then shows Landaverde's vehicle entering the intersection at Ceres Avenue and Juniper Avenue, into the path of the patrol car.

Prior to trial, the plaintiffs filed a motion in limine objecting to the defendants' using, or referring to, the video at trial. The motion cited four grounds for the plaintiffs' objection to the use of the video: (1) that the "recreation was not conducted under substantially similar conditions as those of the actual occurrence," rendering it irrelevant; (2) that "the recreation will absolutely mislead the jury"; (3) that the video "usurps the role of the jury as factfinder"; and (4) that the defendants had not allowed the plaintiffs to conduct discovery regarding "issues that could have fleshed out problems with the recreation." The trial court reserved ruling on the issue until trial.

At trial, counsel for the plaintiffs argued that the video lacked foundation in that the plaintiffs had not had the opportunity to take the deposition of Brady Held, the individual who created the video. Defense counsel stated that a letter that they had sent to plaintiffs demonstrated that the plaintiffs had been offered the opportunity to depose that individual, but that they had failed to complete his deposition within the time period set for discovery. The trial court denied the motion in limine.

Later, the defense called accident reconstructionist Gerald Bretting to explain his analysis of the mechanics of the collision. Bretting explained that he had reviewed the physical evidence at the scene of the collision, as well as the damage to the two vehicles. Bretting reached a number of conclusions based on his examination of the available evidence. Bretting concluded that Landaverde's vehicle had been stopped behind the limit line on Ceres Avenue three seconds before the accident, and that Officer Coillot's patrol vehicle had been traveling at 56 miles per hour two seconds before the collision. Two seconds before impact, Landaverde accelerated into the intersection. Coillot applied his brakes immediately before the collision. Most of Landaverde's vehicle was within the intersection one second before impact, which made it impossible for Coillot to avoid colliding with it. Bretting also testified that another witness's account, i.e., that Officer Coillot's patrol car had made a U-turn to change direction on Juniper Avenue before colliding with Landaverde's stationary vehicle as it sat behind the limit line on Ceres, could not have been accurate. According to Bretting, based on the data, this was not "even a close call."

In connection with Bretting's testimony, the defense showed the jury the 11-second video that illustrated the defense's theory of how the collision had occurred.

Several witnesses corroborated aspects of Officer Coillot's account of the events leading to the collision. Bretting reviewed a number of materials and relied on witness statements in deciding whether to include certain facts in the video reconstruction. For example, witnesses A.J., S.N., S.B., and D.M. had stated prior to trial, and then confirmed during their testimony at trial, that Officer Coillot had activated his vehicle's

emergency lights before the collision. S.B., who lives on Juniper Avenue near the site of the collision, recounted that the patrol car's emergency lights were so bright that they had illuminated his living room as he watched television.

After the presentation of the evidence, the jury rendered a verdict for the defense, finding that Officer Coillot had been responding to an emergency on the night of the collision, and that he had not been negligent. The trial court entered judgment in favor of the defendants based on the jury's findings.

The plaintiffs moved for a new trial and for partial judgment notwithstanding the verdict. The plaintiffs relied on the authority of *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224 (*DiRosario*), in arguing that the video should have been excluded. The plaintiffs contended that the video was not presented from Coillot's perspective, as they maintained was required by *DiRosario*, but rather, was presented from a "very misleading omnipresent point of view — a camera shot from ten feet high, on the opposite side of the street"

The trial court denied the plaintiffs' posttrial motions. The plaintiffs filed a timely notice of appeal.

III.

DISCUSSION

The plaintiffs contend that the trial court abused its discretion in allowing the defense video to be admitted in evidence because, under *People v. Duenas* (2012) 55 Cal.4th 1 (*Duenas*), the video should have been subjected to the "heightened admissibility standards under [*People v. Kelly*](1976) 17 Cal.3d 24 (*Kelly*)), which

defendants failed to meet." (Capitalization & boldface omitted.) Although the plaintiffs spend the majority of their briefing on this issue, they argue in the alternative that "even [a]ssuming *Kelly* is inapplicable [because the video was not a simulation], the video is still inadmissible under *DiRosario* because it was created under substantially dissimilar conditions and misled the jury." (Boldface & some capitalization omitted.)

A. *The plaintiffs forfeited their argument that the video constituted a simulation that required the application of the heightened Kelly admissibility standards by failing to raise this issue in the trial court*

The plaintiffs' main contention on appeal is that, pursuant to the authority of *Duenas, supra*, 55 Cal.4th 1, the video constituted a computer "simulation," and not merely an "animation," such that it should have been subjected to a preliminary showing that "any 'new scientific technique' used to develop the simulation has gained 'general acceptance . . . in the relevant scientific community.' " (*Id.* at p. 21, citing *Kelly, supra*, 17 Cal.3d at p. 30.) In *Duenas*, the Supreme Court explained that an " '[a]nimation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. [Citation.] Animations do not draw conclusions; they attempt to recreate a scene or process, thus there are treated like demonstrative aids.' " (*Duenas, supra*, at p. 20.) In contrast, " '[c]omputer simulations are created by entering data into computer models which analyze the data and reach a conclusion.' " (*Ibid.*)

On appeal, the plaintiffs argue that the video presented by the defendants "was not simply an illustration of expert Bretting's testimony," and thus, cannot be considered to be merely "an animation for demonstrative purposes under *Duenas*." Rather, they

contend, the video should be considered a "simulation" and the trial court "should have required the Defendants to establish the reliability of the technique used in generating the video here."

The problem with the plaintiffs' position on appeal is that the plaintiffs never cited *Duenas* or *Kelly* in the trial court, and, more importantly, never asked the court to evaluate whether the video was a "simulation" or an "animation." In other words, the plaintiffs never requested that the trial court consider whether the video was developed "by entering data into computer models which analyze the data and reach a conclusion" (*Duenas, supra*, 55 Cal.4th at p. 20), or instead, whether the video merely illustrates witness testimony or conclusions drawn by an expert witness. The plaintiffs never argued in the trial court that it was incumbent on the court to assess whether the video had been created using scientific techniques that have gained general acceptance in the scientific community, as they now contend was required before the court could conclude that the video was admissible.⁶ The plaintiffs' failure to challenge the admission of the video on this ground in the trial court results in their forfeiture of this issue on appeal. (See e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 612 (*Kennedy*) ["When an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the

⁶ The plaintiffs argue on appeal that it is of no consequence that they did not refer to *Duenas* or *Kelly* in the trial court in support of their argument because, they assert, it is clear that they may raise new legal authority on appeal in support of an issue that was raised in the trial court. However, our review of the record establishes that the plaintiffs not only did not mention *Duenas* or *Kelly*, but they did not raise the *issue* of whether the video was, in fact, a "simulation" or an "animation" in the trial court.

stated ground for the objection"], disapproved of on other grounds by *People v. Williams* (2010) 49 Cal.4th 405; *Stenseth v. Wells Fargo Bank* (1995) 41 Cal.App.4th 457, 462 ["[I]n order to raise the issue of the admissibility of evidence, a party must make a timely objection *on a specific ground*" (italics added)]; Evid. Code, § 353.)

The reason for the forfeiture rule is clear: "[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error." (*Kennedy, supra*, 36 Cal.4th at p. 612.) The plaintiffs' failure to raise this issue in the trial court deprived the defendants of the opportunity to address the contention that the video had to meet the heightened standard of admissibility established by *Kelly, supra*, 17 Cal.3d at page 30. We therefore decline to consider whether the trial court erred in not requiring the defendants to establish that the video met the heightened admissibility standards set forth in *Kelly, supra*, at page 30, prior to ruling that the video was admissible.

B. *The trial court did not abuse its discretion in ruling that the video constituted admissible demonstrative evidence*

The plaintiffs' alternative argument is that "the video did not meet the requirements of admissibility for demonstrative evidence as required under *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224." According to the plaintiffs, *DiRosario* sets out "the standard for experimental evidence: 'Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant (Evid. Code, §§ 210, 351); (2) the experiment must have been conducted under

substantially similar conditions as those of the actual occurrence; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury.' (*Id.* at 1231, citations omitted.)" The plaintiffs further argue that although the conditions depicted in the videotape at issue in *DiRosario* were determined to have been substantially similar to the conditions encountered by the defendant in that case, the same cannot be said here. Specifically, the plaintiffs argue that the video in this case "was created under substantially *dissimilar* conditions, and those dissimilarities in turn rendered the video extremely misleading to the jury." Specifically, plaintiffs argue that the video differed from the conditions that existed at the time of the collision in four respects: (1) the video depicted traffic conditions as clear, but there were pedestrians and "many other vehicles nearby at the time of the collision"; (2) "the perspective of the video was not from Coillot's perspective as he approached the subject intersection traveling at 57 miles per hour, nor Mr. Landaverde, or of any other witness," but instead, was from a third point of view looking toward the collision scene from approximately ten feet above ground; (3) Officer Coillot's vehicle was depicted as utilizing "full emergency lights and wigwag lights, even though the evidence to support this was clearly in dispute"; and (4) the video depicted Coillot's vehicle from a location more than 300 feet away from the collision site, and this was confusing and misleading because it "created the illusion that Coillot's vehicle should have been seen down Juniper Avenue all the way . . . from where Mr. Landaverde was stopped at the intersection of Ceres and Juniper, which would in turn establish that Mr. Landaverde was responsible for proceeding through the intersection and entering into Coillot's path."

As the Supreme Court note in *Duenas*, *supra*, 55 Cal.4th at page 20, "[c]ourts have compared computer animations to classic forms of demonstrative evidence such as charts or diagrams that illustrate expert testimony." "A computer animation is admissible if ' "it is a fair and accurate representation of the evidence to which it relates " ' [Citations.]" (*Id.* at pp. 20–21.)⁷ We review a trial court's decision to admit demonstrative evidence such as a computer animation for an abuse of discretion. (*Id.* at p. 21.)

We conclude that the video presented by the defendant is a " "fair and accurate representation of the evidence" ' " (*Duenas*, *supra*, 55 Cal.4th at p. 20) to which it related. Specifically, the video is consistent with Bretting's testimony regarding his conclusions as to the relative speeds of the two vehicles, as well as the positioning of the vehicles at the time of impact. Bretting explained that in reaching his conclusions, he had analyzed the data from the "black box" in Coillot's vehicle, he used a high-definition scanner to collect 20 million data points from the accident scene, and he had inspected both vehicles. Bretting analyzed the physics of the collision using a computer program called

⁷ The plaintiffs contend that the proper standard for considering the admissibility of a computer animation is the standard set forth in *DiRosario*—i.e., that "(1) [t]he experiment [portrayed in an accident reconstruction video] must be relevant (Evid. Code, §§ 210, 351); (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury." (*DiRosario*, *supra*, 196 Cal.App.3d at p. 1231, citations omitted. To the extent that this standard differs from the standard for admissibility of demonstrative animations set forth by the Supreme Court more recently in *Duenas*—i.e., that a computer animation must be " "a fair and accurate representation of the evidence to which it relates" ' " (*Duenas*, *supra*, 55 Cal.4th at p. 20)—we take our direction from the Supreme Court's statement of the appropriate standard in *Duenas*.

PC-Crash, and explained that the application of the principles of physics revealed that Landaverde's vehicle had been stationary three seconds before it was impacted. The video reconstruction of the collision provided a visual demonstration of the location and speed of the cars relative to each other over time, consistent with Bretting's conclusions.

Further, to the extent that the video depicted certain elements of the scene, such as the emergency lights on Coillot's vehicle being activated prior to and at the time of the collision, those elements were reflected in the testimony of eyewitnesses presented by the defense, including Officer Coillot. Although the video assumes certain facts about the moments leading up to the collision, Bretting testified that he included these elements because the video assumes that the facts that the defense witnesses testified to were accurate. Thus, for example, while the plaintiffs argue that there was a dispute about whether the emergency lights on Coillot's patrol car were activated, the fact that the video presents the defense's view of the evidence on this point simply means that the video is a fair and accurate representation of the specific evidence on which the defense was relying.

With respect to the other aspects of the video with which the plaintiffs take issue—i.e., depicting the traffic conditions as clear rather than accounting for pedestrians and other vehicles that were present, depicting the scene from an overhead view of the intersection and from a perspective that did not reflect the perspective of either driver, and depicting the scene such that the perspective shown had a view of Officer Coillot's patrol car as far as 300 feet from the collision site despite the fact that Landaverde may not have been able to see that far down the street from his perspective—it is clear that

even under the authority on which the plaintiffs rely, demonstrative animations need not be *absolutely identical* to the conditions that they are attempting to depict. (See *DiRosario, supra*, 196 Cal.App.3d at p. 1231.) Rather, an animation presented as demonstrative evidence may be admitted if it is " ' "a reasonable representation of that which it is alleged to portray" ' " and if it would assist the jurors in their determination of the facts of the case, rather than serve to mislead them. (*People v. Jones* (2011) 51 Cal.4th 346, 375.)

In this case, it would have been clear to anyone viewing the video that the perspective of the video was not from either of the two drivers who were involved in the collision. Bretting acknowledged that the perspective of the collision from the video did not represent either Landaverde's or Coillot's perspective. The plaintiffs seem to suggest that *DiRosario* requires that an accident reconstruction video must present the perspective of one of the individuals involved in an accident. However, *DiRosario* does not require that a video present any particular perspective. The *DiRosario* court did note that "the conditions of the videotape were substantially identical to those encountered by the appellant," but it did so in response to a specific complaint by the appellant that the video showed a fixed view of the intersection, while "the human eye does not view things in the same manner as a fixed camera," and that therefore, the video failed to "accurately depict what [the appellant] could have or should have seen." (*DiRosario, supra*, 196 Cal.App.3d at pp. 1231–1232.) The *DiRosario* court was thus commenting that, at least with respect to the video at issue in that case, which *did* purport to present the perspective of one of the individuals involved in the accident, the conditions of the video were

substantially similar to what that individual would have encountered at the time of the accident.

The *DiRosario* court did not suggest that every video of an accident reconstruction must show the accident from the perspective of one of the individuals involved in the accident. We therefore reject the plaintiffs' challenge to the video on the ground that it did not show the collision from the perspective of either driver involved in the collision. Jurors could see that the perspective of the video was different from that of either driver involved in this collision, and they could choose to give the demonstrative evidence the weight that they felt it deserved, given the difference in perspective. The same is true as to the plaintiffs' argument that the perspective of the video is one that permits the viewer to see Officer Coillot's vehicle from approximately 300 feet away, when Landaverde's view of the vehicle was much more limited. Again, the video does not purport to provide the view that Landaverde had at the time, and there is no requirement that it have done so. The fact that the video was from a different perspective than either driver would have had just before the collision goes to the weight to be given to the video, not to its admissibility. The plaintiffs were free to argue that jurors should give only minimal weight to a video that failed to show the collision from either driver's perspective.

With respect to plaintiffs' complaint that the video did not depict that there were pedestrians and other vehicles in the area at the time of the collision, it is clear that the defendants did not present the video as being an exact representation of everything that occurred on the night of the collision. Bretting admitted that the video was not an identical depiction of the accident, and noted that it would not be possible to create an

identical depiction. He also admitted that the video was not intended to illustrate "everything that was out there," but instead, was designed as a way to illustrate "the motion of the vehicles" in relation to each other. He testified that the timing of events depicted in the video were "basically identical to the time[s] we gather from the PCM [black box]" in the patrol car. Bretting also explained that the presence of other cars in the area was irrelevant to the purpose for which he was making the video because the other vehicles "[were] irrelevant to th[e] view" and "not part of this analysis." Bretting testified that if there had been any vehicles "between these two vehicles [i.e., the two vehicles involved in the collision], I would have added them," but Officer Coillot had a "completely clear" road in front of him.

In sum, we conclude that the trial court did not abuse its discretion in determining that the video was a fair and accurate representation of the evidence to which it pertained—i.e., the eyewitness testimony, as well as the testimony of the defense accident reconstruction expert—such that it could properly be admitted at trial.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.